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ROBERT F. WAGNER, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. ~~_____~~ 70-322

In the Matter of the Imprisonment of
William B. Warren,

Petitioner.

****

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH CAROLINA

****

PETITION FOR WRIT OF CERTIORARI

****

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The petitioner, William B. Warren, prays that a writ of certiorari issue to review the judgment made by the Superior Court Division, General Court of Justice of Caswell County, entered December 4, 1970, denying habeas corpus to petitioner, which judgment the Supreme Court of North Carolina refused to review by its denial of petition for writ of certiorari entered April 6, 1971.

OPINIONS BELOW

The order of the Superior Court Division of the General Court of Justice of Caswell County, North Carolina, in this case is not reported. A copy of the order is appended to this petition. Petitions for writ of certiorari to review this decision were denied by the North Carolina Court of Appeals and the Supreme Court of North Carolina without opinion. Copies of the

JURISDICTION

The judgment of the Supreme Court of North Carolina denying petition for writ of certiorari to review the judgment denying habeas corpus, was made and entered on April 6, 1971. The jurisdiction of this Court is invoked under 28 U.S.C.A. 1257(3).

QUESTION PRESENTED

Whether the parole of a parolee from a state correctional institution can be revoked without notice and hearing, consistent with the Fourteenth Amendment to the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States:

AMENDMENT XIV.

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor

deny to any person within its jurisdiction the equal protection of the laws. . . .

General Statutes of North Carolina:

N.C.G.S. 148-61.1

Revocation of Parole by Board; Conditional or Temporary Revocation.--(a) The Board of Paroles may at any time, in its discretion, revoke the order of parole of any parolee. The time a parolee is at liberty on regular parole shall not be counted as any portion of or part of the time served on his sentence, and if any parolee shall have his parole revoked, he shall thereafter be returned to the penal institution having custodial jurisdiction over him.

(b) The Board of Paroles may, in its discretion, enter an order revoking a parole conditionally or for a temporary period of time. Upon issuing such order of conditional or temporary revocation, such parolee may be arrested without warrant by any peace officer or parole officer. After such conditional or temporary revocation of parole, the parolee shall be held for a reasonable length of time during which the Board of Paroles shall determine whether or not the conditions of said

parole have been violated. If it is determined by the Board of Paroles that the conditions of said parole have been violated, the Board of Paroles may in its discretion revoke the order of parole. If it is determined by the Board of Paroles that there has been no violation of the conditions of said parole, then such parolee or parolled prisoner shall be reinstated upon his original parole.

STATEMENT OF THE CASE

This proceeding arises in the Superior Court Division of the General Court of Justice of Caswell County, North Carolina. Petitioner filed an application for writ of habeas corpus with the Clerk of that Court on October 7, 1970, seeking the release from his confinement by the North Carolina Department of Correction, pursuant to an order of the North Carolina Board of Paroles revoking his parole, on the ground that there had been no notice and hearing in connection with the revocation. Writ of habeas corpus was issued, and the matter was heard in the Superior Court on October 29, 1970. The Court denied habeas corpus in a judgment rendered on December 4, 1970. Petitioner sought review of this judgment by petition for writ of certiorari to the North Carolina Court of Appeals; the Court entered its order on March 2, 1971,

denying the petition. Petitioner further sought review of the judgment by petition for writ of certiorari in the Supreme Court of North Carolina; the Court denied the petition by order entered April 6, 1971. The question presented here, that is the constitutionality of parole revocation without notice and hearing, was timely and properly raised in the Superior Court on the face of petitioner's petition for writ of habeas corpus, and in the North Carolina Court of Appeals and Supreme Court of North Carolina, on the face of petitioner's petitions for writs of certiorari. The Superior Court, in its judgment denying habeas corpus, held that the procedures followed in the revocation of petitioner's parole without notice and hearing were not in violation of the Due Process Clause of the Fourteenth Amendment. The North Carolina Court of Appeals and the Supreme Court of North Carolina, by declining to allow petition for certiorari, did not pass upon the merits of petitioner's constitutional claims. (App., pp. 14-19, hereof)

Petitioner was convicted on June 13, 1969, in the Superior Court of Alamance County, upon his plea of guilty to the charge of embezzlement, and was sentenced to a term of imprisonment of not less than two years, nor more than five years. On December 16, 1969, the North Carolina Board of Paroles issued its certificate of parole to the petitioner, releasing

him to parole supervision in Durham County. (App., p. 14, hereof)

On April 8, 1970, the North Carolina Board of Paroles issued a revocation of petitioner's parole and a warrant for his arrest. Petitioner was not given any notice or warning that a proceeding was pending for the revocation of his parole, nor was any hearing held at which petitioner was given the opportunity to be present, either personally and with counsel, or personally, or through counsel. On April 10, 1970, petitioner was taken into custody in Durham, North Carolina, by parole officer Thomas E. Parrish and two policemen of the City of Durham Police Department, on the authority of the warrant. Petitioner was taken to the Durham County Jail, and subsequently was delivered to the North Carolina Department of Correction. Since the time of his arrest on April 10, 1970, petitioner has been continuing the service of his sentence in the North Carolina Department of Correction. (App., pp. 15-16, hereof; Tr. pp. 2-4, 10-11)

ARGUMENT

The decision below should be reviewed because the Supreme Court of North Carolina has refused to review and reverse a decision of one of the trial tribunals of North Carolina, that decided a federal question of substance not theretofore determined by this Court, and decided

a federal question of substance in a way probably not in accord with applicable decisions of this Court.

The issue raised by this petition for certiorari is whether, consistent with the Fourteenth Amendment to the Constitution of the United States, a parolee may be recommitted to state prison without notice and hearing. The statute providing for revocation of parole, N.C.G.S. 148-61.1, is silent on the subject of notice and hearing. This statute was construed by the Superior Court Division of the General Court of Justice of Caswell County, North Carolina, not to require notice and hearing. There are no decisions of North Carolina appellate courts to the contrary.

"'The fundamental requisite of due process of law is the opportunity to be heard.' ...'at a meaningful time and in a meaningful manner.' ...[T]hese principles require ... timely and adequate notice detailing the reasons for [the action] ..., and an effective opportunity to defend by confronting any adverse witnesses and by presenting [favorable] ... arguments and evidence orally." Goldberg v. Kelly, 397 U.S. 254, 267-268 (1970).

Procedural due process requirements apply to the withdrawal of public assistance benefits, Goldberg v. Kelly, supra, disqualification for unemployment compen-

sation, Sherbert v. Verner, 374 U.S. 398 (1963), denial of tax exemption, Speiser v. Randall, 357 U.S. 513 (1958), and to discharge from public employment, Slochower v. Board of Higher Education, 350 U.S. 551 (1956). Loss of liberty by a parolee is an interest, at least equal in dignity to the interests protected by the foregoing cases. Surely the termination of a parolee's freedom is a condemnation to "suffer grievous loss," Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring), which outweighs the State's interest in summary adjudication of the issue of whether the parole conditions have been violated. Goldberg v. Kelly, 397 U.S. 254, 263 (1970).

In Memoa v. Rhay, 389 U.S. 128, 134 (1967), this Court held that "appointment of counsel for an indigent is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected." Specifically, the Court applied this rule to probation revocation proceedings. Certainly the right to counsel embraces, and indeed presupposes, the right to a hearing of some kind. The petitioners in that case had been provided with a hearing. The holding of that case should apply to parole revocation, as well as to probation revocation. In Hyser v. Reed, 318 F.2d 225, 236 (D.C. Cir. 1963), Chief Justice (then Circuit Judge) Burger, said,

"The legal proceeding most comparable to revocation of parole is revocation of probation." The similarity of the two proceedings is at once apparent upon comparison of the present facts with those in Mempa v. Rhay. Both cases involve recommitment to prison. Petitioner William B. Warren was given a two to five-year sentence, paroled after six months, and recommitted four months later. Jerry Douglas Mempa, in a parallel pattern, was sentenced to probation on the condition that he first spend thirty days in jail, and four months after completion of the active jail sentence, his probation was revoked, and he was recommitted to the institution. See also, McConnell v. Rhay, 393 U.S. 2 (1968).

Revocation of probation and revocation of parole are both crucial stages of a continuing criminal process, in which substantial rights may be lost. Both equally involve a loss of personal liberty.

The two proceedings are also similar in the nature of the decision that must be made. The decision to revoke parole, as well as the decision to revoke probation, requires two separate determinations. The first determination is whether the person conditionally released has violated a condition of his release; and the second determination is whether, if a violation is found, it warrants revocation of the release. The first, factual and retrospective, is a decision typical of the kind

made at an adjudicatory hearing. Kadish, The Advocate and the Expert--Counsel in the Peno-Correctional Process, 45 Minn. L. Rev. 803, 833 (1961); Goldberg v. Kelly, 397 U.S. 254 (1970).

The only difference between the usual probationary revocation proceeding and the usual parole revocation proceeding, is the character of the tribunal making the adjudicatory decision, a court in probation revocation and an administrative agency in parole revocation. Either way, however, a binding determination regarding the liberty of an individual is being made, and for that reason, due process requires a hearing. Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963); Hannah v. Larche, 363 U.S. 420 (1962); Londoner v. Denver, 210 U.S. 373 (1908).

In North Carolina, moreover, revocation of parole works to increase the original sentence. This consequence follows from the provision of N.C.G.S. 148-61.1(a), that, "The time a parolee is at liberty on regular parole shall not be counted as any portion of or part of the time served on his original sentence...." Since "the conditions of parole are a restraint on ... liberty not shared by the public generally," State v. Rhinehart, 267 N.C. 470, 480, 148 S.E.2d 651 (1966), the effect of revocation of parole is to add to the original sentence a punishment consisting of the restraint on liberty for the time

the individual was on parole.

As early as 1909, the Supreme Court of Illinois held that there is a constitutional right to a hearing on revocation of parole. "The term 'due process of law,' however, is not confined to judicial proceedings. It is the same as 'the law of the land,' and extends to every proceeding which may deprive a citizen of life, liberty, or property, whether the process be judicial or administrative or executive in its nature." People v. Strassheim, 90 N.E. 118, 120 (Ill. 1909). Other courts which have decided that parolees are constitutionally entitled to a hearing before parole revocation include Swann v. State, 200 Md. 420, 90 A.2d 690 (1952); and Chase v. Page, 456 P.2d 590 (Okla. Crim. 1969). Parole revocation hearings are required by statute in the federal correctional system. 18 U.S.C.A. 4207. "Twenty-five states and the District of Columbia have statutes that specifically require a hearing upon revocation of parole. Nine state statutes seem to specifically authorize revocation without a hearing. Sixteen state statutes give no indication of whether a hearing is required but in seven of these states the courts have interpreted the statute as not requiring a hearing....In at least three of the states where the statute is silent, however, the courts in cases similar to parole have based a hearing requirement, either expressly or impliedly on the demands of due process."

Rose v. Haskins, 388 F.2d 91, 98, n.4 (6th Cir. 1968) (dissenting opinion of Circuit Judge Celebrezze).

It is no answer to petitioner's complaint that special advantages of informality offset the denial of due process. In In re Gault, 381 U.S. 1 (1967), this Court rejected analogous arguments regarding juvenile court proceedings. The Court observed that "constitutional domestication" would not impair any unique benefits. 381 U.S. 22. Moreover, "procedural regularity ... is a psychological stabilizer; acceptance of law is substantially furthered to the extent that those subject to its rule observe its workings with consistent scrupulous fairness. The inculcation of a similar sense on the part of those subject to the correctional laws tends to further, therefore, the very re-adaptation to the norms of society which it is the ultimate purpose of these laws to achieve." Kadish, The Advocate and the Expert--Counsel in the Peno-Correctional Process, 45 Minn. L. Rev. 803, 836 (1961).

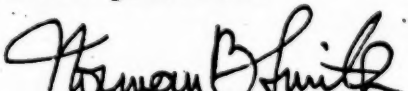
It is also no answer to say that parole is a matter of grace, a privilege and not a right. Some of the most important and far-reaching of this Court's recent constitutional decisions have involved matters which formerly would have been considered "of grace." See Greene v. McElroy, 360 U.S. 474 (1959); Schware v. Board of Bar Examiners, 353 U.S. 232 (1957); Shapiro

v. Thompson, 394 U.S. 618 (1969).

Of course, the right to a hearing upon parole revocation does not imply a requirement for a full judicial trial. It is not necessary at this time to establish the precise dimensions of a parole revocation hearing. The petitioner, however, has not had a hearing of any kind, and he has not even been advised of the basis for revocation of his parole.

CONCLUSION

It is too late in our constitutional history to permit the Kafkaesque experience of sudden arrest without stated reasons, and incarceration without notice and hearing. No legitimate need of the State demands such a deviation from principles of fairness to the individual, in the context of revocation of parole. Certainly, the magnitude of the consequences to the parolee require that he be accorded the basic procedural rights of notice and hearing. It is respectfully submitted that this petition for Writ of Certiorari should be granted.



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APPENDIX TO PETITION

NORTH CAROLINA
CASWELL COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
No. 2485

IN THE MATTER OF THE)
IMPRISONMENT OF)
WILLIAM B. WARREN)

J U D G M E N T

THIS CAUSE coming on to be heard and being heard before the undersigned Judge Presiding on the 29th day of October, 1970, in the Caswell County Superior Court, upon an Application for Writ of Habeas Corpus filed with the Clerk of Court for Caswell County on October 7, 1970; and

IT APPEARING TO THE COURT AND THE COURT FINDING THE FOLLOWING FACTS:

That Petitioner was convicted on June 13, 1969, in the Alamance County Superior Court, while represented by John Zanthos, Esquire, of the offense of embezzlement and was sentenced by the Honorable Edward B. Clark, Judge Presiding, to a term of not less than two nor more than five years; that on December 16, 1969, the North Carolina Board of Paroles issued its Certificate of Parole to the Petitioner paroling him to parole supervision in Durham County; that the Certificate of Parole expressly provides that, "under Section 148-61.1 of the Gen-

eral Statutes of North Carolina, the Board of Paroles may at any time revoke this parole and have him returned to prison to serve the unserved portion of his sentence or any part thereof."; that on December 19, 1970, the Petitioner executed a parole agreement, which provides "that the North Carolina Board of Paroles may at any time for reason or reasons satisfactory to itself revoke, modify, or change its terms"; that on April 8, 1970, for reasons satisfactory to the North Carolina Board of Paroles, the North Carolina Board of Paroles issued its Revocation of Parole and Warrant for Arrest of the Petitioner; that the Petitioner was thereupon taken into custody on the permanent Revocation Warrant and recommitted to the North Carolina Department of Correction; and that the Petitioner is presently in custody and committed to the North Carolina Department of Correction at the Caswell County Prison Unit, Yanceyville, North Carolina.

AND IT FURTHER APPEARING TO THE COURT, from the Application for Writ of Habeas Corpus filed herein, and from the contentions of counsel, that Petitioner alleges that he is being illegally held in custody in that he was not provided notice of the parole revocation proceedings in advance of parole revocation; that he was not given the opportunity to hear the evidence presented against him, and confront and cross-examine the persons with evidence against him, present his

own evidence, and have his contentions heard; and that N.C.G.S. 148-61.1 therefore violates the due process requirements of the Fourteenth Amendment to the Constitution of the United States, since it does not provide for the foregoing, or, in the alternative, if N.C.G.S. 148-61.1 is constitutional, it was unconstitutionally applied in the procedures utilized in the revocation of the Petitioner's parole.

BASED UPON THE FOREGOING FINDINGS OF FACT, the Court concludes as a matter of law that N.C.G.S. 148-61.1 is constitutional; that the procedures followed in the revocation of the Petitioner's parole by the North Carolina Board of Paroles conform to the provisions of N.C.G.S. 148-61.1; that the procedures followed in the revocation of the Petitioner's parole by the North Carolina Board of Paroles were constitutional; and that the due process requirements of the Fourteenth Amendment to the Constitution of the United States are fully satisfied by the provisions of N.C.G.S. 148-61.1, and by the procedures followed in this case.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the Application for Writ of Habeas Corpus is hereby denied and dismissed; that the Petitioner is not entitled to his release from the custody of the North Carolina Department of Correction; and that the time has not expired that he was required to serve pursuant to the sentence validly imposed on June 13, 1969, in the Alamance County Superior Court,

and that he is lawfully incarcerated.

IT IS FURTHER ORDERED that a copy of this Judgment be forwarded to the Honorable Allan Ivie, Jr., District Solicitor; to the Petitioner, William B. Warren, Post Office Box 217, Yanceyville, North Carolina; to counsel for the Petitioner, Norman B. Smith, Esquire, 816 Southeastern Building, Greensboro, North Carolina; to the Attorney General of North Carolina; to the North Carolina Department of Correction, 835 West Morgan Street, Raleigh, North Carolina; and to the North Carolina Board of Paroles, 831 West Morgan Street, Raleigh, North Carolina.

This the 4th day of December, 1970.

/s/ Marvin K. Blount, Jr.
Marvin K. Blount, Jr.
Judge Presiding

NO. 71SC46PC SEVENTEENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

Spring Term 1971

****

IN THE MATTER OF)
THE IMPRISONMENT OF) From Caswell
WILLIAM B. WARREN)

****

Petition for Writ of Certiorari denied by order of the Court in conference.

This the 2nd day of March, 1971.

NO. 71SC30PC SEVENTEENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

Spring Term 1971

****

IN THE MATTER OF)
THE IMPRISONMENT OF) From Caswell
WILLIAM B. WARREN)

****

Petition for Writ of Certiorari denied by order of the Court in conference,

This the 6th day of April, 1971.

/s/ Moore, J.
Moore, J., For the Court